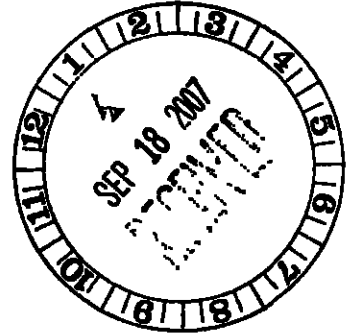


220776

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17 September 2007
express delivery

Hon. Vernon Williams
Secretary
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20024

Re: City of Jersey City, et al. - Petition for
Declaratory Order, F.D. 34818

Reply to Petition for Reconsideration

Dear Mr. Williams:

Enclosed for filing please find the original and ten copies of a Reply on behalf of City of Jersey City, Rails to Trails Conservancy, the Embankment Preservation Coalition and Assemblyman Manzo to the petition for reconsideration filed by intervenors 212 Marin Boulevard LLC et al. ("SLH Properties").

Thank you for your assistance in this filing.

ENTERED
Office of Proceedings

SEP 18 2007

Part of
Public Record

Very truly,

Charles H. Montange
for City of Jersey City, et al.

Encls.

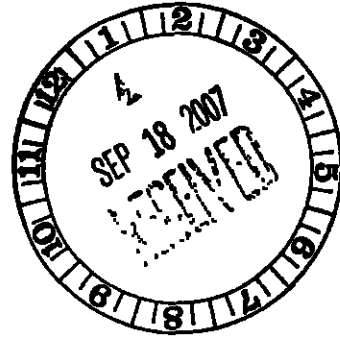
cc. Counsel (per certificate of service)
Jersey City (Ms Monahan & Mr. Curley)
RTC (Ms. Ferster)
Coalition (Ms. Crowley)
Assemblyman Manzo
all w/encl.

BEFORE THE SURFACE TRANSPORTATION BOARD

CITY OF JERSEY CITY,
RAILS TO TRAILS CONSERVANCY,
PENNSYLVANIA RAILROAD HARSIMUS
STEM EMBANKMENT PRESERVATION
COALITION, NEW JERSEY STATE
ASSEMBLYMAN LOUIS M. MANZO

F.D. 34818

PETITION FOR DECLARATORY ORDER



REPLY
ON BEHALF OF
PETITIONERS
CITY OF JERSEY CITY, ET AL.
TO
PETITION FOR RECONSIDERATION
OF INTERVENORS 212 MARIN BOULEVARD LLC, ET AL.
("SLH PROPERTIES")

Petitioners City of Jersey City, Rails to Trails Conservancy, Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition and Assemblyman Louis M. Manzo (hereinafter jointly referred to as "City, et al") oppose the petition for reconsideration filed by intervenors 212 Marin Boulevard LLC, et al. (hereinafter referred to collectively as "SLH Properties" or "SLH") from this Board's decision served August 9, 2007. This Board's August 9 Decision granted the declaratory order sought by petitioners City, et al to the effect that the Harsimus Branch (including the Sixth Street Embankment) was a "line of railroad" for which Conrail must obtain abandonment authority from this Board before transferring into non-rail uses.

Governing Standard for Reconsideration

Petitions for reconsideration filed, as SLH's was, within 20 days of a decision or order are governed by 49 C.F.R. 1115.3. Pursuant to section 1115.3, a petition for reconsideration will only be granted if

- 1) the prior decision will be affected by "new evidence" or "changed circumstances"; or
- 2) the prior decision involves "material error."

The SLH Properties petition for reconsideration declares in its introductory paragraphs (pp. 1-2) only that the Board committed some kind of "material error" in its August 9 decision.

SLH's "New" Photos

On the other hand, the SLH Properties petition also attaches several aerial photographs (denominated A-1 to A-5). 49 C.F.R. 1115.39(c) states that where a party seeks to introduce additional evidence as SLH has attempted, the evidence must appear on its face to be non-cumulative and an explanation must be given why it was not previously provided. Since SLH Properties does not purport to base its petition for reconsideration on new evidence, and does not explain why it could not have produced the aerial photographs earlier,¹ the five aerial photographs (A-1 to A-5) should be

¹ The aerial photographs do not meet the definition of "new evidence." New evidence is evidence that comes into existence after the decision in question; it is not "newly raised" evidence that existed previously. See Friends of the Sierra Railroad v. ICC, 881 F.2d 663, 667 (9th Cir. 1989). The aerial appearance of

stricken from the record. Moreover, the record already contains aerial photographs (indeed, City, et al, furnished an aerial photograph of the entire Harsimus Branch at issue here as Exhibit B to the original request for a declaratory order). The photographs tendered by SLH Properties, if relevant at all, are merely cumulative and for that reason independently should be disallowed. The photos accordingly should be stricken. Accord, Toledo, P.&W. Rwy. v. STB, 462 F.3d 734, 753-53 (7th Cir. 2006).

Summary

The SLH Properties petition for reconsideration on its face enumerates five alleged "material errors." To be "material," an alleged error presumably must be other than harmless. To be other than harmless, an error must genuinely adversely affect a party's substantive rights or the case's outcome. SLH alleges two kinds of error: error in the procedures used by the Board in reaching its conclusions, and errors in the substantive conclusions. As shown below, none of the alleged errors are errors, and if any were, they were harmless to SLH Properties. SLH's arguments in general either ignore the record, repeat matters that are irrelevant, or amount to flip-flops of its earlier positions, which are properly disregarded as inappropriate on petitions for reconsideration.

the Harsimus Embankment has not changed in any material way since City et al. filed our petition for a declaratory order.

ARGUMENT

1. SLH first claims that the Board improperly relied upon material outside the record and on "incompetent" evidence.

The material "outside the record" was (1) decisions of this Board's predecessor authorizing abandonment prior to the formation of Conrail of the railroad line that SLH claimed constituted Line Code 1420,² (2) internet citations to news reports indicating that abandonment of the line referenced in #1 was consummated prior to the formation of Conrail,³ and (3) the Board's helpful statement in footnote 11 of its August 9 decision indicating where the valuation section maps that are otherwise part of the record may be found in ICC proceedings and via the internet.⁴ SLH claims that true copies should have been supplied per 49 C.F.R. 1114.5, and the use of the material must be limited only to corroboration per 49 C.F.R. 1114.6.

STB's evidentiary regulations permit reliance on "[a]ny evidence which is sufficiently reliable and probative to support a decision under the Administrative Procedure Act [APA], or which would be admissible under the general statutes of the United States, or under the rules of evidence governing proceedings in matters not involving trial by jury...." 49 C.F.R. 1114.1. Just as courts can

² SLH reconsid. pet. at top of p. 2, evidently referring to August 9 Decision at page 6 and note 16.

³ SLH reconsid pet. at 2 referencing August 9 Decision p. 7, note 17.

⁴ SLH reconsid. pet. at 2 citing August 9 Decision note 11.

take judicial notice (F.R. Ev. 201(b)), federal agencies can take "official" or "administrative" notice under the APA, but the scope of "administrative notice ... is broader...." de la Llana-Castellon v. I.N.S., 16 F.3d 1093, 1096 (10th Cir. 1994). Looking at the narrower F.R.Ev. for initial guidance, one notes that F.R.Ev. 201 allows judicial notice, whether requested by a party or not, of matters capable of "resort to sources whose accuracy cannot reasonably be questioned." F.R. Ev. 201(e) calls for a judge to give a party opposing judicial notice an opportunity to be heard, but this can be after judicial notice is taken.

The material on which the Board relied (ICC opinions, published articles, the location of valuation maps on the internet) qualifies for judicial notice and certainly for administrative notice, as it is within STB's "specialized experience." de la Llana-Castellon, supra. Moreover, SLH obviously had an opportunity to be heard on STB's use of administrative notice: that opportunity is via the pending petition for reconsideration. SLH, however, has not properly availed itself of its opportunity to be heard; it complains about the administrative notice, but submits no substantive correction to any of the points on which STB has taken notice. In short, SLH does not dispute the accuracy of what STB says the ICC decisions say, nor the evidence of abandonment consummation. Veg-Mix, Inc. v. U.S.D.A., 832 F.2d 601, 606 (D.C. Cir. 1987) (in the absence of "a serious, non-speculative argument" showing evidence

to be unreliable, there is no error in reliance).

STB has thus complied with the APA and F.R. Ev. 201; SLH establishes no material error, either procedurally or substantively. In addition, even if one ignored all the material of which STB took administrative notice, the result in the case would still have been the same: STB merely indicated that it was impossible for Line Code 1420 to be what SLH claimed it was; the agency had several independent grounds to conclude the Embankment was a "line of railroad."

In any event, there was no violation of section 1114.5, assuming it applicable. Section 1114.5 deals with agency "records" but STB relied on agency decisions. As to section 1114.6, that section allows use of corroboratory material. The material on which STB relied simply corroborates that Line Code 1420 is not what SLH claimed it was. STB helpfully pointed to internet sites where relevant material could be reviewed. This is better and faster than making hard copy available. SLH does not claim it could not access the documents of which STB took notice for review. In short, if there was error, it was clearly harmless, not material.

SLH also raises a competency objection against the Verified Statement of Richard James (City, et al Petition's Exhibit E) and various historic preservation materials (id. Exhibit L), relied upon by the Board at August 9 Dec. p. 3 note 3. No one raised any objection to Mr. James or the relevant documents when they went

into the record; to the contrary, SLH instead was complimentary about the accuracy and writing ability of Mr. James.⁵ SLH's objection, made for the first time on a petition for reconsideration, must be considered waived, not preserved, way out of time, and contrived.

In any event, SLH's new position sounds like a hearsay objection, but the APA allows hearsay so long as it is relevant, material and non-repetitious. Veg-Mix, Inc., supra, 832 F.2d at 606; see also Bennett v. NTSB, 66 F.3d 1130, 1137 (10th Cir. 1995). But more to the point, Mr. James has obvious and unchallenged expertise (he is the historian who prepared the National Register nomination for the Embankment), and even under the stringent requirements of F.R. Ev. 702, his opinions may be relied upon by the decider of fact. Moreover, Mr. James's reliance on customary sources of historic information is within the scope of F.R.Ev. 702 and 703. As to Exhibit L, those were matters like the National Register nomination papers themselves and related agency correspondence. They clearly may be received as evidence per the APA (5 U.S.C. 556(d) (2d sentence)). The Board relied on Exhibits E and L for purposes of a physical description of the Harsimus Branch. That description is derived from the same source SLH in its

⁵ SLH was highly complimentary to Mr. James, calling his 1999 paper, "The Pennsylvania Railroad Harsimus Branch Embankment" (part of Petition for Declaratory Order Exhibit L), "well researched and absorbingly written." SLH April 26, 2006 Reply, at p. 5.

Reply of April 24 at p. 5 complimented, and which SLH in its petition for reconsideration at p.9 (reference to retaining walls) still seems to admit. SLH certainly does not suggest anything Mr. James said, or that the Board drew from Exhibits E or L, is actually wrong. SLH thus shows neither error nor prejudice. Accord, Veg-Mix, Inc., supra ("serious, non-speculative argument" needed).

2. SLH's second allegation of "material error" is the claim that the August 9 Decision is inadequately explained and unsupported by the record. This claim in the abstract is obviously absurd, as are SLH's two specific claims under this banner: (a) it wants to know where is Line Code 1420, MP. 1.0 to 7.0, and (b) it claims the Board "overlooked" Conrail Abandonment of the River Line in Hudson County, AB 167 (Sub-nos. 766N & 1067N), served Jan. 17, 2002.

a) SLH asks where is Line Code 1420, MP 1.0 to 7.0. Insofar as relevant to the proceeding, this Board answered that in spades: it encompasses exactly the property at issue in City, et al's petition for a declaratory order. See August 9 Decision at p. 4, quoting deed. City, et al. supplied the deed from the county recorder's office, the relevant track charts, and the deed furnished by Conrail in discovery. They all say what the Board says they say, and they are all part of the record. So, the answer to SLH's question is read the decision.

City, et al sought a declaratory order as to the portion of the Branch commencing at former Henderson Street (at or

approximately at M.P. 1.3 per the track charts) and terminating at Waldo (which is approximately M.P. 2.54 per the track charts). See City, et al Petition p. 2. All that the Board needed to determine is whether what City, et al put at issue fell within Line Code 1420. The Board did. SLH's purported confusion is smoke and mirrors. It admits at p. 9 of its own petition for reconsideration that the Embankment is obvious: it is that big thing "inaccessible without a ladder due to the height of the retaining walls." (Emphasis added.) While saying that it is inaccessible without a ladder is too strong, the point is we all know where the Embankment is in Jersey City, and we all know where the old Pennsylvania Railroad freight mainline was (right up there on the Embankment). SLH fails to show error, material error, lack of support in the record, or whatever else it is claiming in its several pages of contrived confusion.

b) SLH now appears to claim that Conrail Abandonment of the River Line - in Hudson County, N.J., supra, served Jan. 17, 2002, somehow severed the Harsimus Branch from any connection to the interstate freight rail system in 2002. This is a new claim unsupported by any evidence and contrary to what SLH claimed in its prior filings.⁶ SLH cannot argue that it is material error for the

⁶ For example, in its Reply dated Feb. 1, 2006, at p. 6, SLH said that the Embankment was conveyed to Conrail as a spur appurtenant to Line Code 1420, and described Line Code 1420 as Milepost 1.0 to Milepost 7.0, "known as the Passaic and Harsimus line." Incidentally, there is no record of abandonment of such a

Board to "overlook" something SLH never raised. See Topeka, P. & W. Rwy, supra, 462 F.3d at 753, and cases cited (agency need not consider arguments raised for the first time on petitions for reconsideration).

In any event, SLH's latest flip-flop is irrelevant. Per the track charts and other evidence in the record, the River Line was Line Code 1412. At all times, it connected to the Harsimus Branch at CP Waldo. When Conrail reconfigured its track charts to delete the Harsimus Branch, the River Line still connected to the "new" Passaic and Harsimus Branch at CP Waldo (see id. Decision at p. 2, n2).⁷ The River Line did not include, and has never included, any portion of the Harsimus Branch (including the Embankment) between Waldo (roughly MP 2.54 on the relevant track charts for the Harsimus Branch) and MP 1.3 (former Henderson Street).⁸ In short, abandonment of the River Line could not possibly result in a severance.

line; Conrail has received no authority to do so.

⁷ SLH in its Reply of Feb. 1, 2006 referenced in the prior footnote described the Embankment as a spur appurtenant to the Passaic and Harsimus line. It did not claim that the Embankment was appurtenant to the River Line.

⁸ City, et al placed of record the entire Penn Central Track Chart correct to 1-1-75 (Penn Central's last chart before reorganization) by letter dated 23 May 2006. The River Line is Line Code 1412 in the 1-1-75 track chart. It intersects the Harsimus Branch at Waldo but does not include any portion of the Harsimus Branch. Its point of intersection is also apparent at Waldo in the track charts for Line Code 1420.

There is another problem with SLH's argument. There is an active line of freight railroad that intersects the Embankment portion of the old Harsimus to the east of CP Waldo. This line, known as the National Docks Secondary, emerges from the South Portal of the Bergen Tunnel north of Waldo. This line crossed under both the River Line (with which there was an interconnection at CP Nave) and the Harsimus Branch just east of CP Waldo.⁹ If the record were reopened, City et al are prepared to show that the Secondary remains in active freight rail use and that the Embankment portion of the old Harsimus Branch crosses it in route to CP Waldo. There is thus no possibility of severance regardless of the River Line.

3. SLH claims that Jersey City's position is inconsistent with development of the Harsimus Cove and claims various abuses by Jersey City in not letting SLH do whatever it wishes to the Embankment. SLH's claims are totally irrelevant to any showing of error, much less material error. At best, SLH seems to be arguing that the Board materially erred in failing to find that Jersey City

⁹ In the Decision served January 17, 2002, in AB 167 (Sub nos. 776N and 1067N) relied upon by SLH, STB granted abandonment authority for the 1350-foot-long piece of the National Docks Secondary from its point of interconnection with the River Line at CP Nave to the east side of Newark Avenue. Slip op. 2 n.4. However, the parallel portion of the Secondary from the Bergen Tunnel turning southerly toward Oak Island Yard was not abandoned. In other words, Conrail obtained authority to abandon the interconnection to the River Line, but not the Secondary itself. The Secondary is actively used for rail freight. Indeed, City et al are prepared to show that there are plans to expand the Bergen Tunnel to allow the Secondary to be used for double-stacked freight.

is estopped from contesting whether the Branch at issue here is a "line of railroad." But estoppel is an equitable concept that has nothing to do with the substantive merits of whether the Harsimus Branch is a line of railroad, or with the procedural rights of SLH at STB. More to the point, there is no estoppel for at least two reasons. First, SLH does not contend that Rails to Trails Conservancy, the Embankment Preservation Coalition, or Assemblyman Manzo are estopped. Since no one has contested their standing, and since no one claims they are estopped, it follows that RTC, Coalition and Assemblyman Manzo still have un-estopped horses in the race, and their horses are entitled to finish.

Second, SLH's claim that Jersey City abused Conrail and should be estopped is grossly mistaken for many other reasons. To name a few, most if not all the alleged estoppel matters on which SLH relies were actions by Jersey City Redevelopment Agency (JCRA). But JCRA did not have the Embankment in its purview, did not represent all of the City's interests, and was largely autonomous of the City in any event. But the real point is this: Jersey City, much less a largely autonomous local redevelopment agency, did not and does not have abandonment jurisdiction.¹⁰

Local governments and instrumentalities frequently ask

¹⁰ Under 49 U.S.C. 10501(b), STB's power excludes Jersey City and JCRA from being able to authorize Conrail (or SLH) either to abandon a line, or to ignore federal regulatory requirements. Moreover, STB's authority applies to Conrail abandonments as well. Id. & 45 U.S.C. 744(g).

regulated railroads to participate in redevelopment or joint use projects. If the railroads choose to participate, local governments are entitled to rely on the railroads to do so lawfully, which means that the railroads must obtain whatever STB authorizations are required. If railroads (and developers) want to prevent railroad regulatory issues from subsequently arising, then they should comply with the law rather than seek to evade it.

SLH also complains that the Board's decision may impact owners of property between MP 1.0 and MP 1.3 on the Branch, and that Jersey City failed to provide notice to them. City, et al's petition for a declaratory order related to the Branch from approximately Waldo to former Henderson Street (roughly MP 2.56 to MP 1.3 on the pertinent track charts). City, et al provided all the notice required. Should Conrail elect to seek abandonment authority all the way to MP 1.0, City, et al believes that would be good. Mr. Curley, referenced by SLH at p. 6 of its petition for reconsideration, authorizes us to state that he agrees.

As to the remainder of SLH's complaint (i.e., that Jersey City should not adopt ordinances that in effect require developers to show that STB requirements have been met),¹¹ that is all irrelevant to the Board's decision here. SLH again is attacking one of the messengers (i.e., Jersey City), not addressing the message. For the record, the messenger (Jersey City) has not acted wrongly. 49

¹¹ SLH reconsid. pet. at 7.

U.S.C. 10501(b) indicates that federal law preempts state law, and Jersey City properly should refuse to allow developers like SLH to convert lines of railroad into townhouses or whatever else SLH now wishes to propose before STB has even been approached by Conrail for the license necessary to permit the railroad to alienate its regulated property in the first place. Certainly, City agencies should not permit the developer to convert the property into uses totally inconsistent with any current or future rail use prior to STB abandonment authorization. There is law here, not chaos. Moreover, Congress wants the law taken seriously: persons knowingly consenting to or permitting violations of STB abandonment requirements are subject to civil penalties pursuant to 49 U.S.C. 11901©.

It is also telling that SLH's own attorneys have admitted on the record in state court proceedings that if STB has jurisdiction over the Harsimus Branch, the sale by Conrail to SLH was invalid.¹² Since this Board has now found it has jurisdiction over the Branch, rather than accuse the City of acting wrongly, SLH should be complimenting City, et al for acting perspicaciously and lawfully.

4. SLH repeats claims that no purpose is served by determining

¹² 389 Monmouth St. LLC et al v. Historic Preservation Commission of the City of Jersey City, NJ Superior Court for Hudson County, dkt. No. HUD -L - 000804-06 and related cases, transcript of motions 07/21/06, p. 19 (attached hereto).

that the Harsimus Embankment is part of a line of railroad.¹³ A no-purpose claim is essentially an argument either that the line is de facto abandoned such that STB authority is no longer required, or that the whole matter is moot in that no effective remedy can be granted for prior illegalities. Either claim is nonsense; SLH thus shows no error, let alone material error.

As City et al showed in our original petition, it is well-established that non-use of a regulated railroad right of way for a period of time does not replace the need for abandonment authority from this Board.¹⁴ Neither Conrail nor SLH subsequently argued that de facto abandonment somehow amounted to de jure abandonment.

As to SLH's apparent suggestion that assertion of jurisdiction by STB is meaningless, SLH in state court admitted that a finding of jurisdiction by the Board would have a profound effect on SLH's state law claims and pretensions.¹⁵ SLH's admission was made after this proceeding was fully briefed to STB. It must therefore be given heavy weight. SLH specifically acknowledged to the Hudson County Superior Court that a finding of jurisdiction by this Board would effectively nullify SLH's various efforts and the conveyance itself. Given this admission by SLH to the Superior Court, it is impossible to credit SLH's claim that the Board has no effective

¹³ SLH reconsid. pet. at 7.

¹⁴ Petition for Declaratory Order at 18-24.

¹⁵ See note 12.

remedies. As with many of the new and contradictory arguments SLH makes in its petition, SLH again sounds here like the thirteenth chime of a clock.¹⁶

City, et al, as well as numerous commenters, Members of Congress, state legislators, and others, provided ample evidence that there was a legitimate public need for this historic transportation corridor. Although the Board did not note the fact, Jersey City's interest is not only trail use, but also light rail use. The remedy afforded already by this Board assists the public. Should Conrail seek abandonment authority, as we believe it now must, various federal remedies administered by this agency,¹⁷ and state remedies available in the event of an abandonment authorization, will further assist in preserving the corridor for legitimate public purposes.

To the extent SLH claims that open space, trail, or light rail are not consistent with adjoining property uses, SLH supplies no evidence for its views, and is simply wrong. Trails, open space, and light rail are frequently located on former freight rail corridors in residential and mixed use areas such as those that SLH admits surround the Embankment. Examples include the Burke-Gilman Trail in Seattle, the Capital Crescent Trail in Bethesda and

¹⁶ The thirteenth chime calls into question not only the clock's current claim, but all that it claimed before.

¹⁷ See, e.g., 49 U.S.C. 10905 and 16 U.S.C. 470f (and agency orders implementing same in numerous cases).

Washington, D.C., and the Highline in Manhattan. This Board recognized that the Embankment case is similar to the Highline in the August 9 Decision at 10. This Board recently took action authorizing interim trail use for the Highline, which under this authority is expected to become a trail and to be preserved for possible future rail use as well.¹⁹ As we have said, if an elevated urban trail works on one side of the Hudson River, it should also work on the other side. We emphasize again that the Embankment is and remains the way to bring the East Coast Greenway to Manhattan.

5. Finally, SLH claims this Board lacks jurisdiction to determine if Line Code 1420 properties were conveyed to Conrail. Again, SLH never made that argument before, it must be considered waived, and may properly be ignored. Toledo, P.&W. Rwy., supra, 462 F.3d at 753. In any event, SLH admitted that Line Code 1420, including the Embankment, were conveyed to Conrail; SLH sought only to debate the status of the property as conveyed. For example, SLH said, at page 6 of its Reply dated Feb. 1, 2006, that

"The tracks between what had been Waldo Avenue Yard and what had been Harsimus Cove Yard were designated in the Final System Plan as neither a line of railroad to be operated by Conrail nor a light-density line eligible for subsidization by a public body or shippers. The tracks were conveyed to Conrail as a

¹⁹ Chelsea Property Owners - Abandonment, AB 167 (Sub-no. 1094)A, served June 13, 2005.

spur appurtenant to the railroad line designated to be operated by Conrail, namely the railroad line identified as Line Code 1420 between Milepost 1.0 in Jersey City and Milepost 7.0 in Harrison, a segment of the railroad line known as the Passaic and Harsimus Line." (Emphasis added.)

Similarly, SLH in its Reply Statement dated April 24, 2006, did not contest this Board's jurisdiction. Instead, SLH argued that the USRA Final System Plan was dispositive, and invited the Board to determine that line code 1420 simply did not encompass the Embankment. SLH April 24 Reply at 5. This position is wholly at odds with what SLH now claims.

The only matter in dispute is whether the Embankment is a "line of railroad" and thus subject to this Board's jurisdiction. SLH and Conrail appeared to admit that if the Embankment were part of Line Code 1420, which was conveyed as a "line of railroad" to Conrail, then the Embankment was a line of railroad. This Board so determined. But the Board also noted that the Embankment for over 100 years was part of the PRR's main line of freight, and that Conrail used it after acquisition "to move substantial amounts of traffic to serve shippers located on Hudson Street." August 8 Decision at 10. It was a "line of railroad" for one or both of those reasons as well. In short, even if the Embankment were only ancillary to Line Code 1420, or even if the matter were somehow ambiguous (it was not), STB properly determined that the Embankment

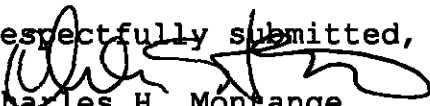
was a "line of railroad" by past historical use or by subsequent actual use or both. Under the circumstances, the Embankment was a "line of railroad" not ancillary track.

Determination of whether rail property is a "line of railroad" is part and parcel of administering Part A of Subtitle IV of Title 49, United States Code. Part A contains STB's exclusive authority over abandonments. Under 45 U.S.C. 744(g), this Board has jurisdiction, not the U.S. District Court for the District of Columbia as suggested by SLH, to administer Part A of Subtitle IV of Title 49 to Conrail. Under 49 U.S.C. 10501(b), the remedies provided by STB preempt (with limited exceptions inapplicable here) all other state or federal remedies. If SLH wants to go to a federal court for another shot at the question, it must be for review of what STB has done, not to supplant STB. The U.S. District Court for the District of Columbia does not have, and under no foreseeable circumstances would have, jurisdiction over anything relevant here. 28 U.S.C. 2321 & 2341, et seq.

Conclusion

The SLH petition for reconsideration fails to show error, much less material error, and fails otherwise to show any ground justifying reconsideration. Jersey City, Rails to Trails Conservancy, the Embankment Preservation Coalition, and Assemblyman Manzo join in requesting the petition for reconsideration be promptly denied.

Respectfully submitted,


Charles H. Montange
426 NW 162d St.
Seattle, WA 98177
(206) 546-1936
for Jersey City, et al.

Attachment:

Transcript Superior Court, Hudson County, 7/11/06, p. 19.

cc. City of Jersey City (c/o Mr. Curley)
Rails to Trails Conservancy (c/o Ms. Ferster)
Embankment Coalition (Ms. Crowley)
Assemblyman Manzo
(all with attachment)

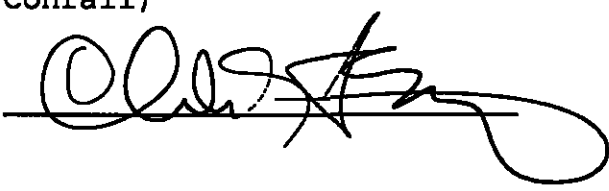
Certificate of Service

I hereby certify service of the foregoing by express service, next business day delivery, this 17th of September 2007 upon the following counsel of record:

Carmine Alampi
Alampi & De Marrais
1 University Plaza, Suite 404
Hackensack, NJ 07601 (SLH)

Fritz R. Kahn
1920 N Street, NW (8th Floor)
Washington, D.C. 20036-4152 (SLH)

Robert M. Jenkins, III
Mayer Brown
1909 L Street NW
Washington, D.C. 20006 (Conrail)



SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CIVIL PART
HUDSON COUNTY
APP. DIV.

389 MONMOUTH STREET, LLC, et al., : DOCKET NO.
: HUD-L-000804-06

Plaintiffs,

vs.

HISTORIC PRESERVATION COMMISSION
OF THE CITY OF JERSEY CITY, et al.,

Defendants.

THE CITY OF JERSEY CITY, : DOCKET NO.
: HUD-L-1554-06

Plaintiffs,

vs.

415 BRUNSWICK STREET, LLC, et al.,

Defendants.

TRANSCRIPT

OF

MOTIONS

212 MARIN BOULEVARD, LLC, : DOCKET NO.
: HUD-L-000800-06

Plaintiffs,

vs.

THE CITY OF JERSEY CITY, et al.,

Defendants.

Place: Hudson County Courthouse
595 Newark Avenue
Jersey City, N.J. 07306
Date: July 21, 2006

////////////////////////////////////
METRO TRANSCRIPTS, L.L.C.

Patrice Mezzacapo

316 Ann Street

Randolph, New Jersey 07869

(973) 659-9494
////////////////////////////////////

I N D E X07/21/06

	<u>Page</u>
<u>ARGUMENT</u>	
By Ms. Donato	5
By Mr. Curley	9
<u>COURT DECISION</u>	21

Colloquy

THE COURT: All right. Seeing how we're seated, this tells me that it's City of Jersey City v. 415 Brunswick Street, LLC.

MR. CURLEY: Yes, Your Honor.

THE COURT: The Docket No. is HUD-L-1554-06.

You are now the plaintiff, Mr. Curly.

You want to give your appearance and spell your last name for the purpose of the tape?

MR. CURLEY: John J. Curly, C-U-R-L-E-Y, for the plaintiff City of Jersey City.

THE COURT: Ms. --

MS. DONATO: Michele R. Donato, D-O-N-A-T-O, on behalf of 415 Brunswick Street, LLC.

MR. HAMILL: Jay Hamill, H-a-m-i-l-l, Bogart, Keane, Ryan, Hamill, on behalf of Jersey City Planning Board.

THE COURT: All right. This is your motion, Ms. Donato -- you can be seated -- to dismiss the complaint of Jersey City for failure to state a claim from which relief can be granted.

And there's also a motion to consolidate made by Mr. Curley, correct?

MR. CURLEY: Yes, Your Honor.

THE COURT: All right. We'll hear you, Ms. Donato.

1 MR. HAMILL: That's fine. I just wanted -- I
2 just wanted to make sure that that wasn't including the
3 other matter. I'm sorry.

4 THE COURT: Okay. What's the choice?

5 MS. DONATO: Your Honor, may I just make a
6 point of clarification?

7 THE COURT: Sure.

8 MS. DONATO: I did indicate that if the STB
9 rules against us that, you know, we obviously don't
10 have an approval. Of course, it would be subject to
11 any appeals that they might take. If there's an
12 appeal, you know, and there's -- whatever the
13 successful -- whenever the litigation with the STB is
14 over, if we, you know, exhaust all of our litigation
15 remedies and we continue to lose, then of course, we do
16 not have title to the property, and we lose any value
17 of the improvements that we may have -- and the
18 approvals that we may have obtained.

19 And the other thing is, Your Honor, with
20 regard to Mr. Curley's argument about the unitary
21 nature of the structure, there's not anything in the
22 ordinance that addresses this point. It's being
23 created out of whole cloth. This is --

24 THE COURT: Regardless -- regardless, it was
25 already -- it was -- presumably, it could have been or

1 was considered. Okay?

2 MS. DONATO: Thank you, Your Honor.

3 THE COURT: Now we're back to you, Mr.
4 Curley. Are we taking a voluntary dismissal of this
5 case without prejudice and without cost? Given --

6 MR. CURLEY: I don't think I can --

7 THE COURT: Given what is on the record.

8 MR. CURLEY: I don't think I can make that
9 decision on my own, Your Honor.

10 THE COURT: Oh, yes, you can.

11 MR. CURLEY: I don't believe I can.

12 THE COURT: Well, do we want to make a
13 telephone call?

14 MR. CURLEY: I will make a telephone call.

15 THE COURT: Make a telephone call right now.
16 Let's get this one over with.

17 MR. CURLEY: Thank you.

18 THE COURT: Then we'll proceed step by step
19 to these vexatious litigations. Not vexatious in the
20 pejorative sense, just vexatious.

21 MR. CURLEY: Vexing.

22 THE COURT: He's vexing.

23 MS. DONATO: I thought that was very
24 (indiscernible), Your Honor, the comment. Somewhat
25 more than vexatious.